No. 22091

United States
Court of Appeals
for the Ninth Circuit

SMITH CANNING & FREEZING CO.,
a corporation,

Appellant,

v.

LLOYD KRAUSE, INC., a corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

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SUBJECT INDEX

INDEX TO AUTHORITIES

CASES

STATUTES

TEXTS AND TREATISES

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JURISDICTIONAL STATEMENT

This is a civil action for recovery of money, brought by appellee. The District Court had jurisdiction on the basis of diversity of citizenship and that the amount in controversy exceeded $10,000. (28 U.S.C. § 1332).

Appellee is a Washington corporation and its principal place of business is in the State of Washington. Appellant is an Oregon corporation with its principal place of business in the State of Oregon. (R. 2).

The cause was originally commenced in the state court in the State of Washington but was removed to the United States District Court for the Eastern District of Washington. Thereafter, on motion for change of venue, the cause was transferred to the United States District Court for the District of Oregon. (R. 2).

This court has jurisdiction of this appeal pursuant to the provisions of 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This appeal is taken from the judgment (R. 30) which held appellant liable to appellee for certain amounts for hauling services during each of the harvest seasons for the years 1960 through 1965 inclusive.

Appellant is a processor of green peas which are used for canning and freezing. Its processing operations are located in Umatilla County, Oregon. The peas are raised on large fields and the harvesting period is in the months of June and July.

During the years 1960 through 1965, the harvesting process required that when the green peas in the pod reached the degree of maturity desired, the peavines were cut off at the ground and swathed into windrows. The peavines were then loaded into trucks by mechanical loaders which raised the vines into the trucks. The trucks then carried the vines to a vining station. There the loads were dumped and the vines

fed into a machine called a viner which separated the green peas from the pods and vines. (TR. 34, 35, 49).

The testimony showed that the hauling of green peavines was not the type of operation which a common carrier could undertake. The standard truck used in the hauling of peas is a two ton truck, (TR. 50) which is a much smaller vehicle than the large over the road trucks used by common carriers. The pea harvesting season covers a period of about five or six weeks during the year, and many trucks are needed during this harvesting season. The truckers who are engaged in this line of hauling must follow the harvest in order to keep their trucks working, and the Krause trucks were used in California and Washington. (TR. 51).

Time is extremely critical in the processing of peas. Green peas are very perishable, and it is essential in the processing that the trucks be available at the moment they are needed to move the peas from the field to the vining station and to the processing plant. (TR. 54).

Mr. Stoddard, manager of appellant, testified:

> "Q (By Mr. Fabre) Is this a continuing hauling process in hauling the peas from the field after they are transported to the vining station?
>
> "A Yes, continuing from the time we start the harvesting.

"Q Are there times when the trucks are there available and nothing to haul?

"A Yes. Some days, we might have ten trucks; the next day, we might have forty trucks in use.

"Q What determines this? What determines the need for the trucks?

"A The maturity of the peas; the time they happen to mature in the field. We have to cut them at certain stages. These peas are real perishable. And, there has to be an expeditious way, within an hour or so, from the field to the plant or the vining station so that they don't spoil." (TR. 54).

The relationship between the parties commenced when Mr. Krause came to the appellant and offered to haul the peas for appellant on an hourly basis. (TR. 52). Other processors either leased or owned their own trucks, and the rate at which appellee was engaged to haul peas was generally higher than the rate at which trucks could be leased.

Mr. Stoddard testified, (TR. 53), that the rate claimed by appellee in this litigation would put appellant out of competition with other processors. As it was, appellant was generally paying a little more for its hauling services than other processors. (TR. 53).

Appellee was engaged by appellant as a contract carrier, (R. 2), and the first season that appellee hauled was 1957 and the hauling arrangements continued

for nine seasons. (TR. 33). The ninth season was the year 1965, and at the conclusion of that season, and for the first time in their relationship, appellee demanded additional compensation for his hauling services. (TR. 59; Ex. 39).

On a few occasions there had been some discussion between the parties as to whether a road haul or field haul rate should be applied in a particular instance, but no dissatisfaction or dissent from the rates paid to appellee had been expressed in the nine years of hauling, (TR. 57-59) until the demand letter of August 9, 1965, (Ex 39) which came after the 1965 season was concluded. This appears from the following testimony given by Mr. Stoddard, manager of appellant, in response to questions by the court, (TR. 37):

> "Mr. Stoddard, did Mr. Krause ever say to you in the middle of the season, 'I want you to pay me the balance owed at the end of the season?'
>
> "THE WITNESS: No, he never did.
>
> "THE COURT: Did he ever make a demand upon you for any additional money?
>
> "THE WITNESS: He never did until we received this letter in August of 1965.
>
> "THE COURT: How many years was that after you started to do the work?
>
> "THE WITNESS: That was the end of the ninth season."

The additional compensation claimed by appellee in this action is $66,593.28, for his hauling services, for the total of the years 1960 through 1965. (R. 3). (Claims for years prior to 1960 would be barred by the Statute of Limitations.)

During the hauling season, appellee prepared billings for appellant so that there was a weekly settlement of accounts. Each Monday these billings were prepared by an employee of appellee, (Ex. 7, pp. 28-29; Ex. 10), and submitted to appellant. These statements were examined and audited by an employee of appellant. (Ex. 9).

Each of the weekly statements prepared by appellee during the period involved is in evidence. (Ex. 31, 32, 33, 34, 35 and 36). These exhibits included cancelled checks of appellant in payment of the statements so rendered and the checks showed endorsement by appellee and cancellation and payment by the bank on which they were drawn.

The trial court questioned Mr. Stoddard about these payments, (TR. 59):

> "THE COURT: After you gave him his check from week to week, did he, except on those two or three instances, accept the payments, and was he satisfied with it as far as you know?
>
> "THE WITNESS: As far as I know, he was.

"THE Court: He did not make any complaint?

"THE WITNESS: No."

In the beginning of their relationship, the parties recognized that as a contract hauler for appellant, appellee would need a permit from the Public Utilities Commissioner of the State of Oregon. (TR. 36; Ex. 7 pp. 11, 12). Oregon Statutes require that a contract carrier file with the Public Utilities Commissioner a copy of his hauling contract. (ORS 767.420 (3) and Exhibit 1-6, with the exception of Exhibit 2 which applied to the year 1961, were filed with the Commissioner. Before a permit is issued to a contract carrier, the Commissioner examines and reviews that contract. (TR. 8).

The parties had agreed upon a rate for the hauling of the peavines. When the contract which specified the agreed rate was submitted to the Public Utlities Commissioner, the rate was not acceptable to the Commisioner. (TR. 36). The Commissioner would only approve a higher rate than the parties agreed upon, and so a new writing was prepared which set forth the acceptable rate. (TR. 8-10, 36). The writings which include this acceptable rate are Exhibits 1 through 6, and are in evidence. Appellee's action is based on these exhibits.

The Appellee undertook, however, to haul appellant's peavines at the rate originally set by the agreement of the parties. This is shown by the billings made, payments made to appellee, and the acceptance thereof in full satisfaction of appellant's obligation.

Resistance to appellee's claim was asserted by appellant on grounds summarized briefly as follows, (R. 6-8):

(1) That the writings in evidence as Exhibit 1 through 6 are not the real contracts between the parties as to the rates for hauling appellant's peavines.

(2) That appellee was paid in full for its hauling services in the amounts appellee claimed to be due in accordance with itemized billings prepared by appellee and submitted to appellant every week during the time appellee was hauling for appellant, and that appellant has fully performed.

(3) That appellee accepted the payments made on its itemized billings weekly (Ex. 31-36), and has acquiesced in appellant's performance and payments and waived any further performance, and is estopped to demand any further performance from appellant.

(4) That the rates set forth in Exhibits 1 through 6 are not enforceable against appellant since the Public Utilities Commissioner has no authority to fix rates for the contract hauling of **agricultural products,**

under the circumstances of this case as provided by ORS § 767.420 (4), which states:

> "(4) The Commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the Commissioner shall apply and enforce the same accordingly; provided, the Commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads."

The trial court's decision (R. 26) was that appellant was liable. His conclusion was that the oral evidence may not be considered which denies the validity of a writing, if the writing was executed to defraud or mislead a third person. (R. 28) The trial court held that the written instruments (Ex. 1-6) must be enforced and that the oral evidence of appellant's manager would vary the effect of those documents and that such evidence was not therefore to be considered.

The trial court acknowledged that he was convinced that Mr. Stoddard, the appellant's manager, was telling the truth with regard to his testimony con-

cerning the relationship between the parties. (TR. 38). The trial court further admitted sympathy for the position of the appellant, (TR. 53), and indicated his decision was a windfall to the appellee, and unnecessarily harsh to the appellant. (R. 28). Perhaps these comments by the trial court would mean that he felt justice was with the appellant, but the law was not.

Appellant contends that the trial court's opinion and order, (R. 26), which serve as findings of fact and conclusions of law, (R. 29), is in error and that judgment should have been entered for appellant on the trial.

SPECIFICATIONS OF ERRORS

The District Court erred in making its findings of fact and conclusions of law and in entering judgment for the appellee in the following particulars:

1. The court failed to hold that the written instruments forming the basis of appellee's claims were not the true and actual agreements of the parties.

2. The court failed to hold that under the provisions of ORS 767.420 (4) the Public Utility Commissioner of the State of Oregon during the years here in question had no authority to fix rates for the hauling of green peavines from the fields to appellant's vining stations and processing plants because said hauling

was not in competition with any common carrier or railroad.

3. In holding that the parol evidence rule requires that the testimony of Mr. Stoddard, appellant's manager, to the effect that the written instruments, Exhibits 1-6, which formed the basis of appellee's action, were not the true and actual agreements of the parties, was inadmissible.

4. In holding that the written instruments, Exhibits 1-6, were valid.

5. In failing to hold that validity of the written instruments, Exhibits 1-6, is here the fact in dispute and that parol evidence is admissible to determine the validity of the instrument as the agreement between the parties.

6. In failing to hold that parol evidence is admissible to show discharge, performance, release or abrogation of a written contract, and to show payment of an obligation or its discharge by accord and satisfaction or by account stated, and that parol evidence is further admissible to show waiver and estoppel.

7. In failing to hold that during the pea harvesting and processing seasons here involved, appellant paid appellee weekly the agreed compensation for its hauling services and that appellant fully performed its contracts with appellee for the hauling of green pea-

vines during said years.

8. That during said years, appellant paid appellee the compensation to which appellee was entitled each week based on the itemized statements furnished by appellee to appellant and appellee fully accepted and acquiesced in appellant's said performance of said contracts during the years here involved and thereby waived any further performance thereof on the part of appellant and by reason thereof appellee is estopped to demand any further performance of said contracts on the part of appellant.

SUMMARY OF ARGUMENT

The argument in support of the specification of errors will be divided generally into three categories, namely, the authority of the Public Utilities Commissioner to prescribe the hauling rates, the effect of the parol evidence rule, and the discharge of the obligation of appellant.

Appellant's poition is that there was no authority on the part of the Commissioner to prescribe the rates to be charged for the hauling under the Oregon statutes, and that acts of the Commissioner fixing the rates are without legal substance and are void. The appellee hauler therefore would have no right to claim additional compensation for hauling appellant's prod-

ucts based on the rates fixed by the Commissioner, but must be satisfied with the rates agreed upon between the parties.

Appellant further contends that the parol evidence rule does not apply in this case to prevent a showing of the true agreement between the parties, since the validity of the writings, (Exhibit 1-6), is the question in this case. The parol evidence rule furnished the sole reason for the trial court's decision, which held that no evidence could be received contrary to the written instruments because it is claimed that the parties intended to use the writings to mislead the Commissioner as to the rates charged. But, as will be pointed out more fully in the argument, the Commissioner legally has no interest or concern with the rates charged in this case and if there was any misleading, it was certainly an immaterial matter.

It is finally the argument of appellant that, even assuming that the instruments sued on are binding, which appellant does not admit, any obligation of the appellant was fully satisfied by the payment to the appellee hauler of the full amount claimed to be due, without reservation of rights or any showing of dissatisfaction as to the rates. The act of appellee in billing appellant for the hauling services and the joint auditing and adjusting of the claims would constitute

an account stated between the parties. The amount of the account stated was paid thereby discharging the appellant from any further obligation to appellee.

ARGUMENT

The Authority of the Public Utilities Commissioner to Prescribe the Hauling Rates

In this case, the appellee sought to recover for hauling services as a contract carrier for appellant, based upon a rate for such hauling services prescribed by the Public Utilities Commissioner of the State of Oregon. The pre-trial order, (R. 5) acknowledges that it is the difference between the comissioner's rate and the rate actually paid which is the amount in dispute.

The statutory scheme in Oregon, (ORS Ch. 767), for the regulation of motor carriers is not unlike that which generally prevails in this country. A carrier is classified and regulated as a common carrier, contract carrier or private carrier, depending upon the particular circumstances. The rates for hauling services for common carriers and contract carriers are regulated excepting in certain instances which have a direct bearing on this case.

The documents which are Exhibits 1 through 6, and which were admitted into evidence, while in the form of a contract, were not the result of negotiations between the parties, but the rates for hauling therein

stated were dictated by the Public Utilities Commissioner. Mr. Singleton, from the office of the Commissioner, testified that his department reviewed and approved the rates, (TR. 9, 10), but Stoddard, for appellant, testified that the rates which the parties specified were not acceptable to the Commissioner, (TR. 36) so that another document was prepared for the Commissioner with rates therein mentioned which were acceptable.

The rates sued for in this action are therefore rates which have been imposed on the parties by the Commissioner. It must then be first decided whether the Commissioner has any right to impose any rate, whatever it is, upon the parties for the services to be performed.

The parties agreed that appellee was a contract carrier. (R. 5). The only authority by which the rates of a contract carrier can be regulated is ORS 767.420 (4) which provides:

> "The Commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the Commissioner shall apply and enforce the same accordingly; provided, the Commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the trans-

> portation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads."

The section referred to relating to common carriers, (ORS 767.410), and which is incorporated into ORS 767.420 (4), permits the Commissioner to fix, declare and prescribe the rates that the carrier is to charge.

We are here concerned with the proviso in ORS 767.420 (4), quoted above, which exempts from the Commissioner's rate fixing authority agricultural products, where the transportation thereof is not in competition with common carriers or railroads.

Appellee attempted to show at the trial that the hauling of peavines for appellant was in competition with common carriers. (The parties in the pre trial order had agreed that none of the hauling was in competition with a railroad. R. 4). Appellee offered evidence that the Public Utilities Commissioner considered competition within the meaning of ORS 767.420 (4) to mean

> " * * * those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration.

"Q Those common carriers would then be deemed competition?

"A Yes, sir." (TR. 16)

Mr. Singleton further testified on cross axamination:

"We consider, sir, that any common carrier possessing the authority to do what the contract carrier proposes to do is competition. He is a common carrier and has the duty and responsibility to perform, if called upon, by any shipper, for the service-for comparable service." (TR. 17).

The parties agreed (R. 4) that during the years in question, no common carrier actually hauled any green peavines from fields to vining stations or processing plants. Mr. Krause testified (Ex. 7, pp. 34, 35) that no other hauler was equipped to haul peavines for appellants.

Mr. Stoddard, for appellant, testified as to the manner and circumstances employed in the hauling of green peavines. (TR. 48-54). He explained the nature of the equipment and the need that the trucks be available for hauling peas to the viner for processing at the time when the correct degree of maturity had been reached by the peas. There was no common carrier who was equipped to haul peavines, according to Mr. Stoddard, and the only practical way of providing for the appellant's hauling needs in harvesting and processing the peas was by means of an arrangement with

a contract carrier.

Attached to the pre-trial order are exhibits setting out the operating authority of various common carriers, (R. 11-25), many of which include the authority to carry general commodities. Authority to haul general commodities includes authority to haul green peavines, according to Mr. Singleton. (TR. 25-26).

Appellee contends that since there were carriers who had authority as common carriers to haul general commodities, there was by this fact alone, competition from such common carriers in the hauling of green peavines. This assertion is made even though admittedly no common carrier hauled or was equipped to haul green peavines, and there was no evidence of any common carrier offering or holding itself out as willing to haul green peavines.

The reasoning behind this assertion apparently is based on the assumption that a common carrier is obligated to haul any goods included in his permit authority of any person requesting services of the carrier. Therefore any pea processor could call on any common carrier having authority to haul general commodities and expect to be served by such carrier, regardless of whether the carrier was equipped to haul peavines or wanted to do so, or had ever hauled peavines before. It is apparently claimed that as long as

the carrier's permit authority allows him to compete for hauling peavines, then he is under a legal duty to compete.

It is submitted that the determination of whether a carrier has a duty to receive and transport goods of a shipper depends not on the authority the carrier has, but upon the holding out by the carrier as to the types and kinds of goods that he will haul. While it is true that under present law, a common carrier cannot legally operate without a permit, his duty to the shipper is not determined by the permit he has, issued by an administrative agency, but his duty is imposed by law.

The Oregon law ORS 767.005 (5) (a) defines a common carrier as:

> "Any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, persons or property, or both, for those who may choose to employ him."

This statute does not define a common carrier in any terms relative to the permit he has. The concept of the common carrier existed at common law, before any attempt was made at government regulation. The duties of such carriers are common law duties unless changed by statute, and there is no Oregon statute found which requires a common carrier to haul that which he does not hold himself out to the public as

willing to haul.

The duty of the carrier to transport the shipper's products was a duty existing at common law. Judge Fee in Montgomery Ward & Co. vs. Northern Pacific Terminal Co., 128 F. Supp. 475 (DC Or 1953), stated that carrier's obligation to the shipper in the following language:

> "Now, at common law a carrier was obligated to accept and transport all commodities which it held itself out to transport for hire, whenever such commodities were tendered to or accepted by it, on nondiscriminatory terms." 128 F. Supp. at 490.

The Montgomery Ward Co. case was an action by a shipper against several carriers for breach of the duty of the carries to receive, carry and deliver goods. The carriers were held liable, not because they had permit authority to transport the goods in question, but because the carriers held themselves out as carriers of the goods tendered, and were liable if they did not accept and carry the goods.

In Bowles vs. Wieter, 65 F. Supp. 359, (DC ED I11, 1946.), the carrier had general commodity authority but limited its business to the hauling of milk from farms to a dairy. He hauled no other commodities. The question was whether the hauler was a common carrier and entitled to be exempt from the pro-

visions of the Emergency Price Control Act, where the hauler was seeking an increase in his rates. The court held that the nature of the hauler's business was such that he was a common carrier, even though limiting himself as to the kinds of property which he held himself out as willing to haul. The fact that the hauler had general commodity authority did not compel him to haul all types of commodities.

In Miles vs. Enumclaw Cooperative Creamery Corp., 12 Wash. 2d 377, 121 P2d 945, (1942) plaintiff's action was to recover for hauling at rates authorized for a common carrier to charge for the hauling involved, although the hauler had in fact made a contract with the shipper to haul for rates equal to about one-half the common carrier rate. At the time such contract was made, the carrier had no common carrier authority, but subsequently applied for and was granted a common carrier permit. The court held that the action was not maintainable because, even though the hauler had a common carrier permit, he was not conducting his business as a common carrier, but as a contract hauler. There was no holding out as a common carrier.

The court in Pfister vs. Central Pac. R. Co., 70 Cal 169, 11 P 686, (1886), had before it the question of the duty of a railroad as a common carrier in trans-

porting property. The court stated:

> "A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as 'transfer companies,' engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property *'of a kind that he undertakes or is accustomed to carry.*" 11 P at 690.

In Anderson vs. Smith-Powers Logging Co., 71 Or 276, 139 P 736, (1914) the court described and defined a common carrier and its duties, stating, "It is not necessary that he carry both passengers and freight, or that he carry all kinds of freight." 71 Or at 283.

To the same effect is Oswego, D & R Ry. Co. vs. Cobb, 66 Or 587, 593 - 595, 135 P 181, 183, (1913); Pacific Spruce Corporation vs. McCoy, 294 F 711, (DC Or, 1923), affirmed in McCoy vs. Pacific Spruce Corporation, 1 F2d 853, (CCA 9, 1924); Director General of Railroads vs. Viscose Company, 254 US 498, 41 S CT 151, 65 L Ed 372, (1921); Ace-High Dresses, Inc.,

vs. J. C. Trucking Co., Inc., 122 Conn 578, 191 A 536, (1937); Alabama Great Southern R. Co· vs. Herring, 234 Ala 238, 174 So 502, (1937); State vs. Rosenstein, 217 Iowa 985, 252 NW 251, (1934); US vs. Smith, 215 F2d 217, (CCA 6, 1954); Olive Kent Park vs. Moshassuck Transportation Co., 71 NYS2d 15, 189 Misc 864, Aff'd 80 NYS2d 729, 274 App Div 765 (....); Austin Fireproof Warehouse Transfer Co. vs. Faltinson, 144 SW2d 905, (Tex. 1940).

Whether a transportation agency is a common carrier depends not on its corporate character or declared purposes, but on what it does. U.S. vs. State of California, 297 US 175, 56 S CT 421, 80 L Ed 567, (1936).

It is what the carrier does that counts and not what it is authorized to do. McKay vs. Public Utilities Commission, 104 Colo 402, 91 P2d 965, (1939); Taussig vs. Moffat Tunnel Water and Development Co., 106 Colo 384, 106 P2d 363, (1940); Phillips vs. Public Service Commission, 127 Pa Super 341, 191 A 641, (1937).

Previous reference has been made to the necessity of special equipment and trucks in the hauling of peavines. Unless the carrier holds out to the public that it is willing to haul commodities requiring special handling, it has no duty to receive and transport such

commodities.

An analogy can be drawn from decisions concerning the duty of common carriers by railroad to furnish tank cars for hauling the products of its shippers. Apparently most of these cars are actually owned and furnished by the shipper and not the railroad.

In U.S. vs. Pennsylvania R. Co., 242 US 208, 37 Sup Ct 95, 61 L Ed 251, (1916), the Interstate Commerce Commission entered an administrative order requiring the railroad to furnish sufficient tank cars for use of certain shippers. This suit was to enjoin the enforcement of the order. It was the practice of those shippers using tank cars to own their own tank cars, although the railroad also owned some tank cars. The order in question would have required the railroad to acquire additional tank cars.

The court held that the Interstate Commerce Act, as amended, required that a carrier furnish cars upon reasonable request, but this means such cars as the carrier had. It gave no authority to the Commission to require tank cars or any other type of car. The duty of the carrier in this regard was the same as at common law, namely, to furnish such cars and equipment for all the business it undertakes and advertises it will do. The jurisdiction to enforce any duty to furnish such equipment is not with the administrative agen-

cy, but with the courts through suits for damages and similar proceedings by the shipper for breach of the duty to furnish the transportation facilities.

A similar case, St. Louis & S.F.R. Co. vs. State, 76 Okla 60, 184 P 442, (1919), concluded that a railroad had no duty to furnish special types of cars, such as a tank car, which was of a different kind than that normally or usually furnished for transportation.

A point not to be overlooked in the railway tank car cases is that where the matter concerns the duty of the carrier to furnish special equipment, or the duty to accept, an unusual type of commodity for transportation, the remedy is with the courts under common law principles, unless specific authority would be given to the administrative agency to deal with that matter. Thus the agency, the Commissioner in our case, would have no right or authority to compel a carrier to haul peavines. If there is a duty under the law for the carrier to transport peavines as a common carrier, which it would not have unless it held itself out as willing to haul peavines, the remedy for the breach of that duty would be with the shipper.

It is therefore apparent in the case at bar that the issuance of a permit by the Commissioner authorizing a carrier to haul all classes of commodities, does not compel or require the carrier to do so. It is not the per-

mit of the Commissioner which sets the extent of the duty of the carrier to the shipper. It is the holding out by the carrier as to the types and kinds of commodities he will haul that determines what duty he has to shippers. Where the carrier holds itself out as willing to haul a commodity, and then refuses, the shipper is the proper person to seek the remedy.

The authority or permit, of itself, does not constitute competition with other carriers unless the carrier goes further and holds itself out to the public as willing to haul particular commodities. Operating authority to haul general commodities cannot, without a further holding out to the public of a willingness to haul green peavines, result in the existence of competition with appellee in this case.

In the case at bar, we find that there was no holding out on the part of any common carrier that it would haul peavines as a common carrier indiscriminately for all persons. It is clear that no common carrier was in the business of hauling green peavines and no common carrier hauled any such green peavines.

Competition implies rivalry, or the act of two persons seeking the same result, that is the business of another. It implies an active rivalry. Without such competition or rivalry between the appellee and common carriers for the business of hauling green peavines, it

is clear that the Public Utilities Commissioner has no right to fix the contract hauling rates for green peavines, according to the proviso in ORS 767.420 (4).

It is a basic principle of administrative law that the agency has only such jurisdiction or authority as is conferred upon it by the Legislature. The agency can act only where it is authorized to act. An attempt by an administrative agency to act in an area where it has no authority is void and of no force or authority. McCarthy vs. Coos Timber Co., 208 Or 371, 391, 302 P2d 238, (1956); Safeway Stores vs. State Board of Agriculture, 198 Or 43, 69, 255 P2d 564, (1953); Gouge vs. David, 185 Or 437, 459, 202 P2d 489, (1949); State, ex rel Peterson vs. Martin, 180 Or 459, 176 P2d 636, (1947); Fred Meyer, Inc. vs. Keasey, 145 Or 266, 27 P2d 311, (1933).

If we strip aside the form of the dealings between the parties, we find a case where the Commissioner was attempting, through the contract between the parties to regulate the hauling rates. The Commissioner must issue a permit to contract haulers before they can legally pursue their hauling, but the issuance of the permit was in this case made to depend upon conforming with the rates specified by the Commissioner. This the Commissioner had no right to require.

Since the Commissioner had no legal authority un-

der the statute to fix the rates as between the parties, the appellee's efforts here to recover on a rate having no real basis in law should be rejected.

The Parol Evidence Rule

The trial court's decision in this case was based solely on his interpretation and application of rules derived from Oregon cases which, it is claimed, hold that in the circumstances here, parol evidence should not be admitted which might vary the terms of the so called agreements, which are Exhibits 1-6. The rule in the cases relied upon is stated to be that the court cannot consider oral evidence denying the validity of the written memorial of the parties, when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third person. Kergil v. Central Oregon Fir Supply Co., 213 Or 168, 189, 323 P2d 947, 948, (1958).

In the Kergil case, the plaintiff hauler brought an action to recover the amount claimed due on a written lease of trucks for hauling defendant's lumber. The defense was that the written lease of the trucks was not intended as a valid agreement, but was a pretended agreement, and that the true agreement was an oral one that the hauling was to be a stated price per thousand board feet. The purpose of the written agreements was to permit the same to be filed with the Public Util-

ities Commissioner of Oregon because where the document filed showed a lease of equipment the shipper would be exempt from a 3 per cent federal transport tax. (26 USCA 141, Internal Revenue Code, § 4291).

The defendant shipper in the Kergil case therefore benefited primarily from the written lease agreement, by being enabled thereby to avoid the transport tax. The plaintiff hauler, although presumably aware of the purpose of the lease, was not avoiding or evading any tax liability, although if the hauler was a contract carrier he would be required to collect the amount thereof from the shipper.

Distinctions exist between the case at bar and the Kergil case, which makes Kergil inapplicable. In our case the written instruments (Ex's 1-6) had no result of avoiding or evading any law or duty which would have been imposed on the parties and particulary the appellant shipper, if the written instruments had not been made. Whatever the parties here agreed upon, they were not attempting to avoid any tax, nor any other duty or law imposed upon the parties, and in particular upon the appellant as a shipper.

The trial court based its application of the Kergil rule on the conclusion that the written agreements were designed to mislead or defraud the Public Utilities Commissioner. The alleged misleading was in re-

gard to the rates charged. (R. 28).

It is clear from our discussion of the meaning and effect of ORS 767.420 (4), above, that the Commissioner is not legally entitled to be concerned about the rates charged in the hauling of agricultural products, where, as here, there was no competition from a common carrier. The Commissioner is specifically instructed by the Legislature to stay out of rate fixing under the circumstances here. No misleading or fraud can exist regarding a matter which is immaterial or on which one is not entitled to act or rely.

It is suggested in the trial court's opinion that if the parties *believed* that the Commissioner had the authority to fix the rates, then the legal consequences are the same as if the Commissioner did in fact have such power. (R.28). However, it is a familiar rule of law that if both contracting parties are mistaken about the existence of material matters under which a contract is entered into, the agreement can be voided. 17 CJS, Contracts, § 144, page 894. So in this case the mutual belief by the parties that the Commissioner has certain authority, when in fact he does not, cannot prejudice the parties, or prevent the determination of their rights in accordance with the true situation.

If the parties did believe in the Commissioner's authority, they were induced to do so by the Commis-

sioner, (Tr. 36), who refused to approve the contract unless his rates were used.

It would be assumed that a trucker would be more familiar with the requirements and authority of the Commissioner than would a shipper, such as appellant, who has no reason to deal regularly with the Commission.

Mr. Stoddard for appellant testified that he had no knowledge about the workings of the Commissioner, (Tr. 52), and relied to a large extent upon Mr. Krause's knowledge of the hauling business and the practices of the Commissioner. It would appear that appellant was the one who was misled.

The Kergil rule is drawn from 9 Wigmore on Evidence, p. 16 § 2406, which does not condemn every so-called sham agreement, but only those agreements where the intention of the parties is morally unjustified. However, it would be considered morally justified to prepare a sham agreement for such a purpose as "to calm a lunatic or to console a dying person." 213 Or at 190, 323 P2d at 949.

It is not the fact only that there is a sham agreement that caused the court concern in the Kergil case. But the purpose for which such agreement was prepared seems to be the true test of whether it should be given effect, under the Kergil rule.

As we have pointed out, we have no evasion of any law or true deception of any party, because the only matter about which there is any claim of pretense is in the rates, and under the facts in this case the Commissioner is specifically told by the Legislature that he has no authority to fix or regulate the rates. Just as the Commissioner could not specify the brand of gasoline the trucker was to use, so the Commissioner cannot specify the rates. The Kergil rule is not applicable in this case.

In a recent case the Oregon Supreme Court has cast much doubt upon it holding in **Kergil**, and it is submitted that there is doubt that the Oregon court would extend the Kergil rule or even now follow it.

This recent case is Story v. Hamaker, 84 Or. Adv. Sh. 145, 423 P2d 185, (1967). In that case the defendant's decedent as seller, executed a land sale contract to plaintiff as buyer which required a down payment of $10,000. The evidence was admitted which showed that this contract was in fact a sham, since the seller wanted to use the contract in order for the plaintiff buyer to obtain from the State Department of Veterans Affairs a loan on the property, and then when the loan was obtained the plaintiff was to reconvey to the seller. The seller had acknowledged to the Department that he made a gift to plaintiff of $8,000 to make the

down payment along with $2,000 which the plaintiff claimed to have paid.

The action was by the plaintiff to recover the $10,000 claimed as the down payment, since the contract was not completed because a third party had and exercised an option for the purchase of the property. Plaintiff knew about the option.

The plaintiff claimed that the testimony about the sham agreement and that no gift from seller to plaintiff was made or intended, was parol evidence and should not have been received. On this matter the court stated:

> "The statute itself (ORS 41.740, the parol evidence rule) provides that the bar against the admission of parol evidence to vary a writing is not applicable 'where the validity of the agreement is the fact in dispute.' This is the fact in dispute here" 84 OR. Adv. Sh. at 147, 423 P2d at 186.

The court then concluded that there was no valid agreement between the parties and the parties had no meeting of the minds, and there was no intention to sell the property to the plaintiff. A judgment for defendant was affirmed.

In the Story case, there was a sham agreement and the parties, and particularly the seller, intended by this agreement to mislead a State agency for the purpose of obtaining a loan. If the Oregon court was

wholly dedicated to the Kergil rule, the Story case was one where it should have been applied. But when the loan was not completed because of the sale of the property to a third party the court could readily find that the agreement was not binding. The State Veterans Agency was not in fact misled because the property was sold without the need for the loan.

Our case is more like the Story case than like **Kergil.** The incorrect loan application in **Story** was not in fact misleading, because it did not come before the agency for official action. The information as to the rates in our case was in fact not misleading because the Commissioner was not entitled to take any official action with regard to those rates. In the Kergil case, considering the whole arrangement the parties had, the parties and particularly the defendant shipper, were attempting to evade a law which imposed a tax. There is an element of the *in pari delecto* concept here where the court will not lend its aid to evade the law by holding the written lease invalid. In our case, no evasion of the law is promoted by holding that the Commissioner's rates are not collectible here and were not the rates actually agreed upon.

The Kergil case was not specifically overruled in Story vs. Hamaker nor did the court discuss the Kergil rule or distinguish the case. The court in the Story

case based its decision upon the plain wording of the parol evidence rule as stated in ORS 41.740:

> "**Parol Evidence Rule.** When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain in ambiquity intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

It is interesting to note that in the Kergil case, the court specifically indicated that the question for decision and the fact which was in dispute was the validity of the lease agreement. Under Oregon's parol evidence rule just quoted where the validity of the agreement is in dispute, parol evidence can be employed to determine validity. The agreement is thus not varied or changed, but shown not exist at all. The court in its opinion in **Kergil** does not explain how it could disregard the parol evidence as to the validity of the lease agreements in the face of the language under Oregon's parol evidence rule.

We therefore submit under this phase of the case that it is the validity of the instruments on which appellee brings its action that is the fact in dispute here. Under the plain meaning of the statute, ORS 41.740, hereinabove set forth, the court is clearly justified in determining the matter of the validity of the agreement by the use of evidence other than the terms set forth in the writing itself, as the Oregon court did in the Story case. We therefore submit that the parol evidence rule does not aid the appellee in this case.

It should be noted in considering the application of the Kergil rule, that Exhibit 2, which covered the year 1961, was not filed with the Commissioner by appellee. (TR 8, 16, 27-29). If, as the trial court held, the parties misled the Commissioner as to the rates to be charged from the terms of Exhibit 1-6, such misleading could not have applied to Exhibit 2 for the year 1961, which the Commissioner did not see. If he did not see it, he could hardly have been mislead thereby.

The Kergil case considered only the application of parol evidence in relation to establishing the original agreement between the parties. The court there did not at all consider whether events occurring subsequent to the making of the written lease agreements had any effect to alter the contractual relationship between the parties.

We submit that under the parol evidence rule, ORS 41.740, above quoted, the subsequent acts of the parties affecting and bearing upon their contractual relationship can be shown, and such evidence may be by parol. The proscription on parol evidence applies only to the terms of the original agreement and to matters which are prior and contemporaneous with the original agreement. Taylor vs. Wells, 188 Or 648, 217 P2d 236, (1950).

But when considering matters regarding modification, discharge, performance, release or abrogation of a written contract, oral evidence may be admissible. Lease vs Corvallis Sand and Gravel Co., 185 F2d 570, (CCA 9, 1951); Ahlquist vs. Alaska-Portland Packers Association, 39 F2d 348, (CCA 9, 1930); Kontz vs. B. P. John Furniture Corp., 167 Or 187, 115 P2d 319, (1941); Craswell vs. Biggs, 160 Or 547, 86 P2d 71, (1939); 20th Century Lites vs. Goodman, 64 CA2d 938, 149 P2d 88, (1944); Haumeder vs. Lipsett, 90 CA2d 167, 202 P2d 819, (1949); Selimos vs. Marinos, 323 Ill App 144, 54 NE2d 836, (1944); United States S.S. Co. vs. Allied S.S. Corporation, 255 F 537, (CCA 2, 1918); Haberman vs. Sawall, 72 CA 576, 237 P 776, (1925); Arsenio vs. Smith, 50 CA 173, 194 P 756, (1920).

Parol evidence is also admissible to show payment

of an obligation or its discharge by accord and satisfaction, and to show waiver and estoppel. First National Bank vs. Brown (Tex) 111 SW2d 806, (1937) Rev'd on other grounds, 134 Tex 38, 131 SW2d 558, (1939); Griswold vs. Frame, 48 CA 178, 191 P 962, (1920); Bu-Vi-Bar Petroleum Corporation vs. Krow, 47 F2d 1065, (CCA 10, 1931); Katz vs. Haskell, 196 CA 2d 144, 16 Cal Rep 453; Boshes vs. Miller, 119 CA 2d 332, 259, P2d 447, (1953).

We therefore submit that the Story case is the guiding precedent to be applied in this case for the purpose of determining the validity of the instruments upon which the appellee brings its action. It is the validity of those writings as agreements which is the fact in dispute in this case and there is under such circumstances no limitation on the right to use evidence outside the writing to determine the true intent and agreement of the parties. We also contend that the subsequent conduct of the parties in modifying, performing and discharging the contract which actually existed between the parties can be shown and that there is no limitation imposed by the parol evidence rule on the presentation of such facts.

Discharge of Appellant's Obligation

There is in evidence (Exhibits 31-36) statements prepared by appellee hauler for each week during the

entire period in question in this case showing the charges made by appellee for the weeks hauling. These exhibits include the checks showing payment of the amounts demanded in the statement. Mr. Stoddard testified (Tr. 37, 59) and it is undisputed in the testimony, that during the nine years of hauling for appellant, Mr. Krause never made any demand for additional money or claimed any dissatisfaction with the hauling payments made until August, 1965, shortly before this action was commenced.

Appellant's position is that appellee has been paid in full in accordance with statements submitted by appellee, and that appellee has accepted these payments as being in full for its services and has waived any further performance by appellant and is estopped to demand any further performance.

The representatives of the parties met each Monday morning during the hauling season to settle their accounts. (Tr. 66). At these meetings the itemized statements were presented to appellant, and adjustment made if necessary as between the rates for a field haul or a road haul. The statements then, as adjusted, were paid by the checks which are in evidence. (Exhibits 31-36).

Even if it be assumed that the written instruments, Exhibits 1 through 6, originally expressed the agree-

ment of the parties as to the rate to be paid to appellee, it is clear that the subsequent payment to and receipt by appellee of the amounts requested, constituted a joint departure from the terms of the original agreement, and that such terms in the original agreement are abrogated to that extent. In re Swindle, 188 F Supp 601, 604 (DC Or, 1960); Mathis vs. Thunderbird Villages, Inc., 236 Or 425, 438, 389 P2d 343, 349, (1964); Kontz vs. B. P. John Furniture Corp., 167 Or 187, 205, 115 P2d 319, 326, (1941); City Messenger Co. vs. Postal Telegraph Co., 74 Or 433, 441, 145 P 657, 659, (1915).

The figures arrived at between the parties at their regular Monday morning meetings would amount to an account stated between the parties. The result was a discharge of appellant's duty under the contract when the amount claimed in the account stated between the parties was paid.

In Sunshine Dairy vs. Jolly Joan, 234 Or 84, 85, 380 P2d 637, 638, (1963), the court stated:

> " 'An account stated is an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transaction and promising payment: * * *' Steinmetz vs. Grennon, 106 Or 625, 634, 212 P 532.
>
> "The cruz of an account stated is an agreement between the parties that a certain amount

is owing and will be paid." 234 Or at 85, 380 P2d at 638.

In State ex rel Kaser vs. Leonard, 164 Or 579, 94 P2d 1113, 102 P2d, 97, (1940), the plaintiffs brought action for wages claimed to be due them. The work for which the wages was claimed was highway construction where the rates to be paid the workers in various job classifications and categories was specified by the United States Bureau of Public Roads. The claims of plaintiffs were based on alleged discrepancies between what was paid and what should have been paid according to the job classifications. The court found that every week when the plaintiffs were paid, they examined the time keepers records and then satisfied themselves that they were receiving the full amount due. The court held that each week there was an account stated for the preceding week's labor. The amount found due was paid, and that disposed of the matter. Judgment was directed to be entered for defendant.

An account stated effects a discharge of an obligation or contract according to Restatement of Contracts, § 422. Subsection (1) of that section states:

"Matured debts are discharged by a manifestation of assent in good faith by debtor and creditor to a stated sum as an accurate compu-

tation of the amount of the matured debt or debts due the creditor, or if there are cross demands as the amount of the difference between indebtness due the other party. A new duty arises to pay a sum so fixed."

The comment to this section reads:

"a — Such an agreement as is within the rule stated in the Section is called an account stated. It must be founded on previous transactions creating the relationship of debtor and creditor. An unliquidated sum due as compensation for breach of any other duty than a money debt cannot be discharged in the way stated in the Section. The distinction is not, however, of great practical importance since the recognition of the possibility of an executory accord operating if so intended as an immediate discharge of a previous claim.

"b — The validity of an account stated does not depend upon any uncertainty as to the existence or amount of the antecedent claims since the stated sum is supposed to be fixed, primarily, by way of computation rather than compromise.

"c — It is not essential than an account shall be stated in a particular form. Any evidence indicating assent by a debtor to his creditor that a stated amount is that due the creditor, is ground for implying a promise by the debtor. Expressed statements are not essential; inferences from conduct are enough. So that retention of a statement of account without objection for more than a reasonable time, implies consent to its correctness. Though it is usually

> the creditor who submits a statement of account, it may be the debtor."

It is apparent that the conduct of the parties in this case in settling the hauling charges from week to week fits squarely within the rules of an account stated as set forth in the Restatement of Contracts above quoted. When the appellee retains the proceeds of the checks which were given to it in payment of its charges, without objection for more than a reasonable time, it certainly implies consent on the part of the appellee to the correctness of the payment.

The circumstances in this case are also very much akin to the situation where the parties to an agreement set about to discharge the obligations under the contract and agree on what is necessary in order to discharge such obligation and that performance is accepted in full discharge of the contract. A valid and executed accord and satisfaction is thereby accomplished and the contractual obligations must be considered as discharged. The effect of a valid accord and satisfaction is stated by the Oregon court in Brady vs. Selberg, 154 Or 477, 60 P2d 1104 (1936) in the following language:

> "To constitute a valid accord and satisfaction it is also essential that what is given or agreed to be performed shall be offered as a satisfaction and extinction of the original demand; and

> the debtor shall intend it as a satisfaction of such obligation, and that such intention shall be made known to the creditor in some unmistakeable manner. It is equally essential that the creditor shall have accepted it with the intention that it should operate as a satisfaction. Both the giving and the acceptance in satisfaction are essential elements, and if they be lacking there can be no accord and satisfaction. The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction." 154 Or at 479.

A party to a contract may waive any term of the contract which is for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract acordingly. James vs. Ward, 96 Or 667, 675, 190 P 1105, 1107, (1920).

A waiver is the voluntary relinquishment of a known right of a party and a waiver may be shown by the acts of that party or by such party accepting benefits accruing on account of the waiver. Widing vs. Jensen, Real Estate Comm., 231 Or 541, 547, 373 P2d 661, 664, (1962); Cross vs. Campbell, 173 Or 477, 493, 146 P2d 83, 89, (1944); Smith vs. Martin, 94 Or 132, 138, 185 P 236, 238, (1919). Certainly when appellee each Monday billed appellant for hauling services for the previous week, and received payment of the amount, there can be no doubt but that any alleged rights for additional compensation were waived. Proof

of the waiver is clear and convincing because of the admitted acceptance by appellee of the payments requested.

CONCLUSION

The aim and purpose of any legal system ought to be the securing of justice as between the conflicting rights and claims of the parties. The protection of legal rights should be distinguished from mere legalism. The judicial process, of course, is not just a mechanical application of certain formalized rules to a certain situation, but the application of legal principles with discretion born of experience and the philosophy of the law.

In this case we discern no real justice in appellee's claims. Appellee has not offered any justification for its assertion that it is entitled to $66,593.28 from appellant, excepting a rule which, it says, prevents appellant from showing the true facts. But the appellee was paid for its hauling every week, and the amount it requested was paid and was accepted. It now demands more.

If the American concept of justice for all can be given practical effect, this is the case for it. Justice in this cause would compel a holding that appellee has willingly and knowingly accepted full payment for

all its hauling for appellant and is entitled to nothing more. The judgment of the District Court should be reversed and this cause dismissed.

Restpectfully submitted,

FABRE, COLLINS & EHLERS
Attorneys for appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date:_____day of_____1967

_____

Of Attorneys for Appellant